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## Choice of Law: A Guide for Texas Attorneys

James P. George

*Texas A&M University School of Law*, [pgeorge@law.tamu.edu](mailto:pgeorge@law.tamu.edu)

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# CHOICE OF LAW: A GUIDE FOR TEXAS ATTORNEYS

by James P. George\*

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\* B.A., Oklahoma State University; J.D., University of Tulsa; LL.M., Columbia University. Associate Professor of Law, Texas Wesleyan University School of Law. © 1993 by James P. George.

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## I. INTRODUCTION

This Article is a follow-up to one published in 1987,<sup>1</sup> which attempted to illustrate the proper Texas choice of law analysis under the then-recently-adopted "most significant relationship test."<sup>2</sup> The prior Article was intended for Texas judges, and considered only what ought to occur in a Texas state or federal court. This successor Article is for Texas practitioners, but goes beyond the Texas courtroom. It focuses on the choice of law process in Texas state and federal courts, but is broad enough to acquaint

1. James P. George, *Choice of Law Outline for Texas Courts*, 18 TEX. TECH L. REV. 785 (1987).

2. See *infra* note 32 and accompanying text.

the reader with choice of law in all courts in the United States, and to some extent, courts outside the United States. It is directed to litigators, but should also be useful to transactional attorneys facing choice of law decisions.

Two premises are essential to understanding choice of law analysis:

*Forum law controls choice of law.*<sup>3</sup> This premise has three implications. First, the initial task in choice of law analysis is to identify the forum, then to identify the forum's pertinent choice of law rules. If the lawsuit has not yet been filed, the attorney must analyze choice of law as to potential forums, that is, those forums with personal and subject matter jurisdiction. Second, in transactional matters, attorneys should give any potential forums' choice of law rules the same consideration as personal jurisdiction and substantive law, taking care to verify that the intended applicable law will not be undone by contrary public policy or law (either substantive law or choice of law rules).<sup>4</sup> Thus, do not use *renvoi*<sup>5</sup> unless the forum's choice of law rules require it.

*In the United States, choice of law rules have three sources, generally in the following priority:* First, specific choice of law statutes, unless the forum allows the statutory choice of law to be superseded by a contractual choice of law;<sup>6</sup> second, contractual choice of law agreements, if the forum allows them;<sup>7</sup> third, general choice of law rules usually governed by forum common law, such as the most significant relationship test used in Texas courts.<sup>8</sup>

These three choice of law sources are subject to preemption by constitutional rules<sup>9</sup> and potentially by international law rules,<sup>10</sup> both of which are part of forum law.

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3. That forum law controls choice of law may seem obvious, but many lawyers view choice of law problems as being governed by ill-defined principles emanating from both within and without the forum, or without reference to any forum. This may be caused by the problematic area of *renvoi*, see *infra* Part VI.C, or by the fact that as much of the operating theory of choice of law comes from scholars as from courts and legislatures. Whatever the reason for the confusion, choice of law can be more easily understood by focusing on the forum. If forum law is defined as including local cases and statutes, along with preemptive federal, and to some extent, international rules, then choice of law starts and stops with forum law. Nothing will occur in the choice of law process that is not dictated by forum law.

4. Attorneys use both forum selection clauses and choice of law clauses to promote enforcement of the contract. But in selecting a given state as providing the forum and the applicable law, parties may fail to consider the effect of the chosen forum's choice of law rules and public policy on the validity of their contractual choice. Even more problematic is the situation in which a contracting party sues in other than the designated forum, because the parties' choice may be even more susceptible to attack.

5. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1988); see also *infra* Part VI.C. (discussing *renvoi*).

6. See *infra* APPENDIX A for examples of statutory choice of law rules.

7. See *infra* Part III.A.

8. See *infra* Part IV.B.1.

9. See *infra* Part IV.B.2.

10. See *infra* Part IX.

Readers should note that this discussion focuses on "horizontal" choice of law (choices between geographically distinct jurisdictions), and not on "vertical" choice of law (choices between overlapping jurisdictions, such as federal-state conflicts under the *Erie* Doctrine).<sup>11</sup>

## II. DEFINITIONS

*State* means a territorial unit with a distinct general body of law. It includes both states of the United States and foreign states. In this Article, other states in the United States are denoted by a capitalized "States." Non-capitalized "states" refers generically to all such territorial units, domestic and foreign, although the terms "foreign countries" and "nation-states" are sometimes used for clarity.

*Forum* or *forum state* means the state in which the lawsuit is filed. This Article uses "forums" as the plural, instead of the Latin "fora."

*Local law* is the substantive law of the chosen state. The *whole law* of a state is its local law plus its choice of law rules. The forum's choice of law rule — which is always controlling — will usually point only to the local law of the chosen state. In a few special cases the forum's choice of law rule will point to the "whole law" of the chosen state, meaning that the chosen state's choice of law rule is applied. This process is called *renvoi*.

*Foreign law* means any law other than Texas law or United States federal law. Foreign law includes States' laws and other foreign countries' laws.

The foreign terms *dépeçage* and *renvoi* are italicized only in their first usage in the text, and are defined both in their first usage and in the *Glossary* at Appendix B.

This Article draws heavily from two Restatements, which are cited as follows: *Restatement (Second)* refers to the *Restatement (Second) of Conflict of Laws*;<sup>12</sup> *Restatement (Third) Foreign Relations* refers to the *Restatement (Third) of the Foreign Relations Law of the United States*.<sup>13</sup>

## III. TRIGGERING THE CHOICE OF LAW INQUIRY

Choice of law issues are possible any time a lawsuit has a foreign element such as a nonresident party or an event outside the forum. The issue arises in one of three ways: (1) a prior choice of law agreement by

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11. For a brief discussion of vertical conflicts, see *infra* Part VII, and *infra* notes 85-91 and accompanying text.

12. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1988).

13. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) [hereinafter "RESTATEMENT (THIRD) FOREIGN RELATIONS"].

litigants; (2) a pleading for the application of foreign law; or (3) on the court's own discretionary motion.

### A. Choice of Law Agreement by the Litigants

Most American courts will enforce a contractual choice of law clause if it meets all four of the following criteria:

1. it is a valid agreement with an effective choice of law clause;<sup>14</sup>
2. it is applicable to the lawsuit under the terms of the contract;<sup>15</sup>
3. it is reasonably related to the lawsuit (i.e., the chosen law is from a state to which the parties or the contract, or both, are connected);<sup>16</sup> and,
4. it is not in violation of the public policy of the forum or other interested state.<sup>17</sup>

14. That is, have the parties made an effective choice of law agreement? Look for a prima facie agreement only. If there is any justiciable question as to the agreement's validity, it must be resolved by applying the parties' chosen law, unless that choice was made in order to evade important forum policy as to contract validity, *see generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988) and comments following (discussing public policy and the "reasonable basis" requirement), or unless there is some other reason to deny the parties' choice. Note that although most choice of law agreements are express, a clearly implied choice of law should also be honored. *E.g.*, *Pritchard v. Norton*, 106 U.S. 124, 137-41 (1882). For further discussion, *see George, supra* note 1, at 789 nn.8-9.

15. The choice of law agreement's applicability may be based on the lawsuit being one of the following:

- a. An action *arising on the agreement* in which the choice of law clause appears;
- b. An action *contemplated by the agreement* in which the choice of law clause appears.

*See Austin Bldg. Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697, 701 (Tex. 1968) (holding that a contract's effect is determined by the law the parties intended to control). If neither of the above apply and if no other valid basis exists for applying the parties' choice of law agreement, then the court should disregard the agreement and apply forum law or, if requested by a litigant, a more appropriate foreign law. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1988) ("Law Governing in the Absence of Effective Choice by the Parties").

16. Section 187(2)(a) requires a "substantial relationship" between the chosen state and the parties or the transaction. Case law, however, requires the lower "reasonable relation" standard. Note that § 1.105 of the Uniform Commercial Code uses "reasonable relation" as a basis for parties' choice of law in a U.C.C. contract. *See George, supra* note 1, at 789 nn. 12-14, 17, 18; *see also* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 669-75 (2d ed. 1992) (discussing the requirement of a "substantial relationship"). In 1993, the Texas Legislature enacted TEX. BUS. & COM. CODE ANN. § 35.51(c) (Vernon Supp. 1994), permitting parties to certain transactions to select the law of a jurisdiction lacking a reasonable relation.

17. Public policy of the forum: If the parties' choice of law agreement is valid and applicable to the action, and their chosen law has legislative jurisdiction, it should be applied unless its application would violate the forum's public policy. *See Gutierrez v. Collins*, 583 S.W.2d 312, 321 (Tex. 1979) (citing *Castilleja v. Camero*, 414 S.W.2d 424, 427-28 (Tex. 1967)). Public policy concerns must be fundamental and strongly held; mere variance between the foreign law and forum law is not enough to deny the foreign law's application. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680-81 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1988). The Constitution's Full Faith and Credit Clause encourages application of other States' laws where no forum policy is infringed upon. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322-23 (1981) (Stevens, J., concurring). Thus, all but the strongest forum policies must give way to the full faith and

The Supreme Court of Texas has adopted *Restatement (Second)* section 187, specifically addressing contractual choice of law,<sup>18</sup> as well as section 188, addressing choice of law for contract disputes with no effective choice by the parties.<sup>19</sup>

There can, however, be legislative restrictions. The Texas Legislature has regulated, and in some cases restricted, contracting parties' power to choose a governing law. For example, a limited class of contracts with clauses designating the law of another state must provide conspicuous notice.<sup>20</sup> In 1993, the Texas Legislature enacted a new choice of law statute permitting parties to certain contracts to choose the law of any jurisdiction bearing a reasonable relation to the contract.<sup>21</sup> Another Texas choice of law statute preempts choice of law clauses in designated insurance contracts.<sup>22</sup> See Appendix A for brief discussions of these statutes.

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credit mandate.

Public policy of other interested states: Note that § 187 of the *Restatement (Second)* provides that the pertinent public policy interests include not only the forum's interests, but also those of any other state whose law would be applied in the absence of the parties' choice of law. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 187(2)(b) (1988). Of course, in many cases forum public policy may also deny the application of the law otherwise selected by the forum's choice of law rule. For additional discussion of the role of public policy in negating the parties' contractual choice of law, see, e.g., 793 S.W.2d at 681-90.

Readers should note the effect of newly enacted *Tex. Bus. & Com. Code Ann.* § 35.51 (Vernon Supp. 1994), which may allow a by-passing of public policy for certain contracts. See *infra* note 21.

18. 793 S.W.2d at 677.

19. *Id.* at 678.

20. *TEX. BUS. & COM. CODE ANN.* § 35.53 (Vernon Supp. 1994). In 1993, § 35.53(a) was amended and now provides as follows:

- (a) This section applies to a contract only if:
  - (1) the contract is for the sale, lease, exchange, or other disposition for value of goods for the price, rental, or other consideration of \$50,000 or less;
  - (2) any element of the execution of the contract occurred in this state and a party to the contract is:
    - (A) an individual resident of this state; or
    - (B) an association or corporation created under the laws of this state or having its principal place of business in this state; and
  - (3) Section 1.105 of this code does not apply to the contract.

*Id.* § 35.53(a).

Section 35.53(b) provides the standard for notice of the application of another state's law: "[T]he provisions must be set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice." *Id.* § 35.53(b). It did not change in 1993. Also in 1993, § 35.53(c) was reworded and recodified as § 35.52. See *id.* § 35.52.

21. *TEX. BUS. & COM. CODE ANN.* § 35.51 (Vernon Supp. 1994). Section 35.51 introduced controversial additions to Texas choice of law rules, including the ability to choose a law contrary to both Texas public policy and the public policy of the state with a more significant relation to the transaction, *id.* § 35.51(b), and the ability to choose a law lacking a reasonable relation to the parties and the transaction, *id.* § 35.51(c).

22. See *TEX. INS. CODE ANN.* art. 21.42 (Vernon 1981).

### B. Pleading by One or More Litigants<sup>23</sup>

A litigant may trigger choice of law issues by a timely and proper pleading of the reason to apply a foreign law and proof of the content of that law.<sup>24</sup> It is unclear, however, whether pleading is always required. Because Texas state and federal courts are required to take judicial notice of the laws of other States in the United States, a litigant seeking the application of another State's law may get by with less than a pleading — perhaps a mere request on record to the court will suffice. If the request is beyond the pleading deadline, opposing parties may have a valid objection to the surprise if they have no prior notice.

### C. Sua Sponte Choice of Law

If the lawsuit contains a foreign element suggesting that non-forum law may be appropriate, but the parties have not raised a choice of law issue, the court may consider choice of law on its own motion.<sup>25</sup>

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23. Defendants, of course, more likely than plaintiffs are to ask for foreign law. The goal of forum-shopping plaintiffs is often more than merely suing defendants in a convenient forum. Plaintiffs also seek to increase the chances of having the forum state's law applied. For example, if one wishes to sue under the Texas Deceptive Trade Practices Act in a fact setting having little contact with Texas, the chances of having the Texas DTPA apply increase markedly if the suit is brought in Texas. Two prominent reasons are: (1) the forum's natural preference for its own law, based both on convenience and provincialism; and (2) some judges' erroneous belief that defendant's amenability to the forum's judicial jurisdiction supports the application of forum law. *But see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (both holding that forum state jurisdiction did not compel application of forum state law). Defendants should not acquiesce to plaintiffs' push for forum law. If the case has a foreign element, one should consider the arguments (under the forum's choice of law rules) for applying another state's law.

24. *See infra* Part IV.C.

25. If the forum state has legislative jurisdiction and the parties have failed to request the application of any foreign law, the court may apply forum law under the presumptions listed in Part V.A of this Article. *See infra* note 53 and accompanying text. However, the court is not required to follow the presumptions favoring forum law; it may instead conduct a full choice of law analysis to determine the most appropriate law.

If the forum state lacks legislative jurisdiction and the parties have failed to request the application of foreign law, then the parties should be advised of the inappropriateness of forum law and be requested to provide arguments on the identity and content of applicable foreign law(s). If the parties provide arguments and evidence for the application of only one foreign law that has legislative jurisdiction, then it should be applied. If the parties argue for more than one foreign law with legislative jurisdiction, then a choice of law analysis should be conducted as described in Part IV of this Article. If the parties fail to provide any sufficient choice of law arguments, the court may:

- a. apply forum law under the presumption that it is the same as the unproven foreign law, or that the parties have acquiesced to forum law, *see infra* Part V.A; or
- b. dismiss the case if the pertinent forum law (hypothetically lacking legislative jurisdiction) is unsuited or unintended for the presumptions stated above; or
- c. consider choice of law sua sponte (on its own motion) by determining which states have a minimal relationship to the action, then choosing the most appropriate state's law as will be explained in Part IV. These three options are discretionary.



#### IV. CHOICE OF LAW ADVOCACY

##### A. *Identify the Choice of Law Problem*

###### 1. *Which Issues are Affected?*

###### *Are Different Issues Governed by Different States' Laws?*

Texas and several other states practice *dépeçage* — choice of law analysis on an issue-by-issue basis.<sup>26</sup> The question arises: do the contacts and public policy interests in your case dictate the application of one state's law to one isolated issue, or will the entire substantive claim be governed by one state's law?

###### 2. *Which States' Laws Might Apply?*

Courts look not only to the states obviously connected (such as where the event occurred), but other states whose interests are at stake. Litigants faced with this issue should also examine the pertinent sections of the *Restatement (Second)*, such as sections 6, 145, 188 and others to determine the important connecting factors for their case, and to identify potentially interested states.

###### 3. *Is There a Genuine Conflict?*

According to Justice Stevens's dissent in *Phillips Petroleum Co. v. Shutts*,<sup>27</sup> along with the opinions of many scholars, a true conflict exists only if there is a potentially outcome-determinative distinction between the laws of two or more affected states. According to this strict reading of false conflicts, the conflict must exist as to one or more material issues, and each conflicting state must have clearly established law on point. Mere ambiguities should not be construed as creating a conflict. On the other hand, the *Phillips* majority was willing to perceive a conflict where the laws

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Generally option (a) is preferable because it resolves the dispute instead of dismissing it, and does so under the substantive law the court presumably prefers. See George, *supra* note 1, at 794-95 nn.18-29.

26. See *infra* Part VI.B. In *Duncan v. Cessna Aircraft Co.*, the Texas Supreme Court stated: "[I]n all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984) (emphasis added). For an example of *dépeçage*, see *Faloon v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1352 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

27. 472 U.S. 797, 823-45 (1985) (Stevens, J., concurring in part and dissenting in part); see also *infra* Part VI.D (discussing false conflicts).

were not precise. Thus, if a state's law is ambiguous and can be argued to your favor, argue that the *Phillips* majority impliedly authorizes a choice of law even where no clear conflict exists. If the ambiguity is not in your favor, argue the Stevens dissent in *Phillips*.<sup>28</sup>

Some states use a slightly different definition of false conflict, for which this argument might not apply.<sup>29</sup>

#### 4. What Results are Wanted?

Advocates should remember that choice of law is an advocate's tool, both at the transactional stage and the litigation stage. If contacts with the desired state are weak, argue other factors such as parties' expectations or public policy. Advocates should not make the common mistake of viewing choice of law as a legal barrier. Choice of law can be used as an opportunity to advance a case.

#### B. Be Prepared to Argue that the Chosen Law Satisfies:

##### 1. The Forum State's Choice of Law Rules

The forum state will apply its own choice of law rules, most likely in the following priority: (1) specific statutes, (2) choice of law clauses in contracts, and (3) the forum's general choice of law rule.

##### a. Statutes

Because statutes supersede common law, a choice of law statute will supersede the forum's general choice of law rule, which tends to be common law. Even if a State had a statutory general choice of law rule, that rule would nonetheless be superseded by a more specific choice of law statute focused on a particular substantive area of law. *Restatement (Second)* section 6(1) reflects the priority of choice of law statutes. A choice of law

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28. Justice Stevens complains that the Court's majority engaged in an unwarranted review of the Kansas Supreme Court's choice of law decision. Pointing out that the Kansas court examined the pertinent state's laws and found "no 'direct' or 'substantive' conflict," 472 U.S. at 824, Stevens concludes that the Supreme Court "long ago decided that state-court choices of law are unreviewable here absent demonstration of an unambiguous conflict in the established laws of connected States." *Id.* at 845. But see *Faloona* 607 F. Supp. at 1341, in which both the trial and appellate courts engaged in a thorough choice of law analysis, with the Fifth Circuit reversing the trial court on the application of California law to half the case, only to conclude that California and Texas laws were either the same or produced the same outcome. To avoid this problem, the court should place the burden on the party seeking the application of nonforum law to demonstrate an unambiguous conflict.

29. See Part VI.D; see also *infra* APPENDIX B (providing alternative definitions of "false conflicts").

statute will also supersede the parties' contractual choice of law because the parties cannot enter an agreement that evades a statute unless the legislature permits it by so providing in the choice of law statute itself, or in another statute.<sup>30</sup>

If there are no statutes on point, then one should consider the next priority.

*b. Agreement By the Parties in a Pre-Lawsuit Contract*

Litigants should follow the guidelines described in Part III.A, *supra*, taking care to verify not only that the choice of law agreement is valid, but that the forum does not legislatively preempt such clauses in your specific contract. Some states may also preempt a choice of law agreement if the chosen law is contrary to the public policy of a state with a more significant relation to or interest in the transaction.<sup>31</sup>

If there is no valid agreement, express or implied by the parties, then consider the final priority.

*c. The Forum's General Choice of Law Rule*

General choice of law rules are usually common law, that is, mandated by the courts rather than the legislature. Starting in 1984 with *Duncan v. Cessna Aircraft Co.*,<sup>32</sup> Texas has used the most significant relationship test from the *Restatement (Second)* section 6, which provides a seven-factor balancing test:

(1) *the needs of the interstate and international systems* — focuses on promoting harmony between states by choice of law rules that other states regard as fair;<sup>33</sup>

30. See, e.g., TEX. BUS. & COM. CODE ANN. § 1.105 (Tex. UCC) (Vernon Supp. 1994). See APPENDIX A for a partial list of Texas and federal choice of law statutes.

31. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) and cmt. g (1988).

32. 665 S.W.2d 414 (Tex. 1984). In *Duncan*, the court stated that "in all choice of law cases except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Id.* at 421.

Note that the court adopted only the most significant relationship test, and not the *Restatement (Second)* in its entirety. In fact, *Duncan* expressly declined adoption of *Restatement (Second)* § 170. 665 S.W.2d at 420 n.4. Because the most significant relationship test [as stated in § 6 of the *Restatement (Second)*] interacts with most of the other choice of law provisions in the *Restatement (Second)*, one may argue that *Duncan* does adopt all such choice of law provisions in the *Restatement (Second)*. However, the most realistic view is that *Duncan* adopted only § 6. This view is underscored by the court's piecemeal adoption of the *Restatement (Second)* since *Duncan*. See, e.g., *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990) (adopting §§ 187, 188, 196), *cert. denied*, 498 U.S. 1048 (1991). Even if *Duncan* did not adopt all choice of law provisions in the *Restatement (Second)*, its other choice of law rules should be persuasive.

33. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) and cmt. d (1988).

(2) *the relevant policies of the forum* — determined by the forum's pertinent substantive law and contacts with the dispute;<sup>34</sup>

(3) *the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue* — this, along with factor (2), creates a weighing of states' interests;<sup>35</sup>

(4) *the protection of justified expectations* — most appropriate to contracts, least appropriate to negligence;<sup>36</sup>

(5) *the basic policies underlying the particular field of law* — addresses cases in which the policies of the interested states are the same, but there are minor differences in specific laws, e.g. usury and trusts;<sup>37</sup>

(6) *certainty, predictability, and uniformity of result*;<sup>38</sup>

(7) *ease in determination and application of law* — that is, choice of law rules should not result in a law that is too difficult for the court to apply.<sup>39</sup>

These factors are not exclusive and may be supplemented as justice requires. Moreover, the factors are not listed in order of importance, and will have varying significance in different cases. In all but the simplest cases the factors will point in different directions, that is, to different choices of law. These factors are meant to reflect competing interests, and some choices may be difficult.<sup>40</sup> But if the court considers all factors in these difficult cases, and gives them the weight the court deems appropriate, a fair result will likely occur.

As noted above, *Restatement (Second)* section 6 is a *balancing* test, requiring at least initial consideration of all seven factors. Some courts have overlooked the balancing feature and treated section 6 as a laundry list from which the most prominent factor decides choice of law. While only the hardest cases should involve all seven factors, a decision based on one or two factors will short-circuit the balancing test. Although one factor may stand out in a choice of law problem, the court should not allow that one factor's prominence to undermine a fair consideration of the other factors which may, when fully considered, reveal interests competing with the

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34. *Id.* § 6(2)(b) and cmt. e; see also, George, *supra* note 1, at 798 n.37 (discussing the potentially countervailing effect of a forum states' "strongly-held" public policy); "State Interest" in APPENDIX B.

35. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) and cmt. f (1988). Although another state may have a strong interest relating to the lawsuit (such as a strict usury law), that state's interest in the particular lawsuit itself may be minor compared to the interests of the forum and other states, thus making the strong policy of the first state less important in this particular dispute. See *id.* § 6 cmt. f; "State Interest" in APPENDIX B.

36. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. g (1988).

37. *Id.* § 6(2)(e) and cmt. h.

38. *Id.* § 6(2)(f) and cmt. i.

39. *Id.* § 6(2)(g) and cmt. j.

40. See *id.* § 6(2) and cmt. c.

interests in the prominent factor. By the same reasoning, advocates should not allow the prominence of one or two factors to cloud their insight as to other factors that could enhance their arguments for the application of a more favorable law.

One final point is the interplay between section 6 and the *Restatement (Second)*'s other sections. If any of the *Restatement Second*'s specific rules for issues in contract, torts, and other areas apply, use them with the seven factors of the most significant relationship test. Note that in *Duncan*, the supreme court adopted only the most significant relationship test as expressed in *Restatement (Second)* § 6.<sup>41</sup> The court did not adopt the *Restatement (Second)* in its entirety, but instead has adopted other sections piecemeal.<sup>42</sup> Nonetheless, the *Restatement (Second)*'s other choice of law sections — addressing specific issues in tort (§§ 145-185), contract (§§ 186-221), property (§§ 222-266), trusts (§§ 267-282), business corporations (§§ 296-313) and other areas — should be persuasive.

This discussion applies only to Texas, and to a lesser extent, other States using the *Restatement (Second)*. For a discussion of choice of law in other States and foreign countries, see *infra* Parts VIII & IX.

## 2. *The Federal Constitution (and the Forum State Constitution, if Pertinent)*

An advocate may wish to defer this argument until the opponent or the court raises it. The use of constitutional issues in an initial argument will complicate it unnecessarily, because constitutional choice of law issues need not be pleaded initially. Instead, such issues should be raised in response to an opponent's objection to a choice of law request. However, one should always consider the constitutional issues whether argued them or not.

The United States Supreme Court has relied primarily on two constitutional doctrines for limiting states' choices of governing law: due process, and full faith and credit. Due process prevents the forum from applying the law of any state (including foreign countries) that lacks a reasonable connection to the parties or the dispute.<sup>43</sup> Full faith and credit requires the

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41. 665 S.W.2d at 421

42. See e.g., *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680-81 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991) (adopting § 187). Prior to *Duncan*, the supreme court adopted §§ 6 & 145, limited to tort issues, in *Gutierrez v. Collins*, 583 S.W.2d 312, 321 (Tex. 1979) and § 169 regarding spousal tort immunity in *Robertson v. Estate of McKnight*, 609 S.W.2d 534 (Tex. 1980).

43. The Due Process Clause requires a reasonable (sometimes termed "minimal" or "sufficient") connection between a legal dispute and the state whose substantive law is applied to it. This requirement is known as "legislative jurisdiction," and it governs all choice of law problems including those of contractually chosen law. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and cmt. d (1988). Justice Stevens has noted that

forum to weigh the policies and interests of other affected States in the United States (not foreign countries), and to apply the law of another State if its interests significantly outweigh those of the forum State.<sup>44</sup>

Litigants should note the similarity between the full faith and credit requirements and the interest-balancing factors of the most significant relationship test.<sup>45</sup> Full faith and credit merely establishes a vague mandate to consider other States' interests — it does not mandate a deference to those interests unless they significantly outweigh the forum's interests. Due process, on the other hand, mandates that the forum apply only the laws of a State with some connection to the parties and the dispute.

In addition to due process and full faith and credit, five other constitutional doctrines may limit the States' choice of law rules: Equal Protec-

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choice of law creates due process concerns in three ways: (1) unfair surprise; (2) irrational favoring of residents over nonresidents; and (3) "dramatic departure from the rule that obtains in most American jurisdictions." 449 U.S. at 326-27.

This minimal connection is similar to the minimum contacts requirement for personal jurisdiction over nonresident defendants. Unfortunately there is very little guidance as to what constitutes a minimal connection in legislative jurisdiction. For suggestions in establishing the minimal connection, see *George*, *supra* note 1, at 791 n.14.

If either party establishes to the court's satisfaction that the chosen law has legislative jurisdiction, that law should be applied. If the court is not persuaded, or if the parties fail to provide arguments on legislative jurisdiction, the court may:

- a. apply forum law, if the forum has legislative jurisdiction;
- b. if the forum state lacks legislative jurisdiction but has judicial jurisdiction (which is unlikely but not impossible), the court may raise choice of law *sua sponte*. Another option is for the court to exercise the presumption that by failing to prove the contents of any foreign law, the parties have acquiesced to application of forum law; or
- c. if the forum state lacks legislative jurisdiction and the court fails to find the contents of another suitable law, the court should either apply forum law, under the presumption that unproven foreign law is the same as forum law, or dismiss the case. See *Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.—Austin 1984, writ ref'd n.r.e.). This situation will not happen often, but is possible where a plaintiff sues for tortious injury occurring in a foreign country where the laws are not widely published.

Legislative jurisdiction can be complex and difficult. Fortunately, the problem does not arise often. If the forum state has judicial jurisdiction, the same underlying contacts between the forum and the defendant will usually—but not always—create legislative jurisdiction. Thus, forum law is a likely substitute if the parties' requested foreign law lacks legislative jurisdiction.

One need not address legislative jurisdiction in every choice of law situation. It requires analysis only when raised by the opposing party, or by the court in obvious cases. However, while the pleadings may overlook legislative jurisdiction, the actual examination of a choice of law problem—by the parties or the court—should always consider the issue.

44. *E.g.*, 472 U.S. at 814-23; 449 U.S. at 307-20.

45. See *supra* Part IV.B.1.c (factors 2 and 3).

tion,<sup>46</sup> Privileges and Immunities,<sup>47</sup> the Commerce Clause,<sup>48</sup> the Supremacy Clause,<sup>49</sup> and, possibly, the Contract Clause.

### *C. Pleading and Proof of Non-Forum Law*

If the preferred law is not forum law, then litigants must carefully comply with the forum's rules for pleading and proving foreign law. These rules are procedural, and thus strictly governed by forum law without recourse to choice of law possibilities. Texas and federal courts provide two examples that show the similarity, but also the subtle distinctions between jurisdictions.

#### *1. In Texas Courts*

##### *a. Judicial Notice of Other States' Laws in Texas Courts*

Texas law provides in part that:

(1) A court, upon its own motion may, or, upon the motion of a party, shall take judicial notice of the constitutions, rules, regulations, ordinances, court decisions and common law of every other State, territory or jurisdiction of the United States;

(2) A party requesting judicial notice shall furnish the court sufficient information to enable it to comply properly.<sup>50</sup>

##### *b. Proving Foreign Country Law in Texas Courts*

Texas law also provides in part that:

(1) the party relying on the law of a foreign country shall give notice by pleading or other reasonable written notice at least thirty days prior to trial;

(2) notice must include all written materials or sources to be offered as proof of the foreign law;

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46. *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544, 551 (1923).

47. *Cf. Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (holding a residency requirement for admission to the bar violates the Privileges and Immunities Clause).

48. *See generally Texas v. New Jersey*, 379 U.S. 674, 682 (1965) (adopting the rule that the state of a corporation's domicile may cut off the claims of private persons only and not the claims of another state with proof of a superior right).

49. *Cf. McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) (holding that state courts cannot deny jurisdiction solely because claims are brought under federal statutes). Texas courts neither certified originals or photocopies, but do require particularized pleadings as to other State's law. *Cal. Growers, Inc. v. Palmer Warehouse Transfer Co.*, 687 S.W.2d 384 (Tex. App.—Houston [14th Dist.] 1985, no writ).

50. *See TEX. R. CIV. EVID.* 202 (formerly *TEX. R. CIV. P.* 184).

(3) if the foreign law's original text is not English, the party must provide both the original non-English text and an English translation;

(4) evidence of foreign law includes affidavits, testimony, briefs, treatises, and any other material source, whether or not submitted by a party, and whether or not admissible under the Texas Rules of Evidence. If the court considers sources not offered by a party, it must give reasonable notice, an opportunity to comment on the sources, and an opportunity to submit further materials;

(5) the determination of foreign law is a question of law, not fact. (This may seem a truism today, but is a relatively recent change in the law.)<sup>51</sup>

## 2. *In Federal Court*

### a. *Judicial Notice of States' Laws in Federal Court*

By federal common law, federal courts must take judicial notice of the laws of all States in the United States.<sup>52</sup>

### b. *Proving Foreign Country Laws in Federal Court*

Federal law provides for the pleading and proof of foreign country law by pleadings or other reasonable written notice. In determining the content, the court may consider testimony or any other relevant material or source,

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51. TEX. R. CIV. EVID. 203 (formerly TEX. R. CIV. P. 184a).

52. Interestingly, the Federal Rules of Evidence intentionally abstain from judicial notice of states' laws, noting the provision for judicial notice of foreign country law in FED. R. CIV. P. 44.1, and suggesting that the rules of civil procedure are more appropriate for designating the proper method for pleading and proof of non-federal law. See FED. R. EVID. 201 advisory committee's note. The Federal Rules of Civil Procedure, however, do not address pleading and proof of states' laws, leaving only the federal common law of *Lamar v. Micou*, 114 U.S. 218, 223 (1885) (holding that federal courts must take judicial notice of the laws of any State). Accord *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987). Even though FED. R. EVID. 201 (the sole federal evidence rule dealing with judicial notice) does not cover states' laws, we should assume that the judicial notice mandate for states' law in *Lamar* is subject to FED. R. EVID. 201(b)'s provision for proof of matters "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." That is, judicial notice of States' laws is taken from the official statutory and case reports of a given state, by unofficial versions that are widely used, or by copies, all subject to federal evidentiary laws on authentication and best evidence. Somewhat inconsistent with *Lamar*, 28 U.S.C. § 1738 (1988) (the full faith and credit statute) provides for authentication of legislative acts and court records and proceedings of "any State, Territory, or Possession of the United States," thus allowing a means of offering states' laws into federal court. *Id.* However, this authentication provision apparently does not apply to the mere proof of content of a states' law in a federal diversity case. If 28 U.S.C. § 1738 does require proof of the content of state's laws by authenticated copies, this is inconsistent with *Lamar* and its progeny, as well as the current practice in federal court.



whether or not submitted by a party, and whether or not admissible under the Federal Rules of Evidence.<sup>53</sup>

## V. PRESUMPTIONS AND PREFERENCES

### A. *Preference for Forum Law*

Forum law should be applied in Texas courts unless another law is shown to be more appropriate by the parties' agreement or a Texas choice of law rule. Forum law is favored by presumption in two situations. First, the parties may request application of a foreign law but fail to prove its contents. It may then be presumed that either Texas law is the same as the unproven foreign law, or that the parties have acquiesced in the application of Texas forum law by failing to meet the burden of proving their requested foreign law.<sup>54</sup>

Second, all other things being equal, forum law applies. That is, where the forum state has a relationship to the dispute as significant as other affected states, forum law is applied. Note however that this rule does not apply where the parties have made a valid pre-lawsuit choice of law agreement. In those cases the choice of law analysis is never reached, and significant relationships are never evaluated.

### B. *Situs Presumptions*

The *Restatement (Second)*'s specific subject matter choice of law rules presume the applicability of certain foreign laws related to the situs of the event giving rise to the cause of action. For example, *Restatement (Second)* section 146 states that in an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless some other state has a more significant relationship to the occurrence and the parties. These presumptions reflect many of the old mechanical choice of law rules — such as *lex locus delicti* and *lex locus contractus* — that were the basis of common law choice of law and the first *Restatement of Conflict of Laws*. In the *Restatement (Second)* these situs presumptions retain the ease of application of the old mechanical rules

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53. FED. R. CIV. P. 44.1 is a briefer version of the requirements in TEX. R. CIV. EVID. 203.

54. *E.g.*, *Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Creavin v. Moloney*, 773 S.W.2d 698, 702 (Tex. App.—Corpus Christi 1989, writ denied). This rule has also been applied in federal court. *E.g.*, *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1005-06 (5th Cir. 1990). See TEX. R. CIV. EVID. 202 and 203 for the requirement of furnishing the court with sufficient information to determine the content of nonforum law. See also George, *supra* note 1, at 800 n.43 (discussing the presumption that unproved foreign law is identical to Texas law).

without their sometimes harsh, inflexible results.<sup>55</sup> The *Restatement (Second)* accomplishes this by providing that a certain state's law will apply unless another state has a more significant relationship under the factors set out in the *Restatement (Second)* section 6.<sup>56</sup>

### C. Preference for the Parties' Chosen Law in Contractual Lawsuits

*Restatement (Second)* sections 187 through 197 govern choice of law in particular contracts, and gives the parties' contractually chosen law priority over (1) forum law, (2) the situs-based presumptions discussed in the preceding paragraph, and (3) any other choice of law determined by the forum state's statutory or general choice of law rules. This preference for the parties' chosen law in contract actions is also reflected in Texas statutes,<sup>57</sup> and in the seminal choice of law holding in *Duncan v. Cessna Aircraft Co.*<sup>58</sup>

The parties' choice is merely a presumptive preference, however. It can be displaced if the choice lacks legislative jurisdiction,<sup>59</sup> if the results are contrary to strongly-held forum state policy, or if the results are contrary to a strongly-held policy of the state whose law would be applied if not for the parties' choice of law.<sup>60</sup>

### D. Presumption Against Renvoi

As discussed *infra* in section VI.C., renvoi is the practice of using the choice of law rules of one or more states other than the forum state.<sup>61</sup> Some attorneys avoid choice of law issues because of the difficulty of dealing with renvoi, and an incorrect belief that renvoi is an ever-present analytical requirement. It is not. *Restatement (Second)* section 8 provides that choice of law rules should be read as excluding renvoi unless either of two narrow exceptions are present.<sup>62</sup> In addition, *Restatement (Second)*

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55. See George, *supra* note 1, at 802 n.48.

56. See *supra* Part IV.B.1.c.

57. See TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon Supp. 1994). But see TEX. REV. CIV. STAT. ANN. art. 852a, § 9.03 (Vernon 1964).

58. 665 S.W.2d 414 (Tex. 1984); see *supra* note 32.

59. This is defined as a reasonable connection between the chosen state and the dispute. See *supra* note 17.

60. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1988); *cf.* DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990), *cert. denied*, (holding that where parties include choice of law provisions in their contract, judicial respect for that choice advances the public policy of protecting contracting parties' expectations) 498 U.S. 1048 (1991).

61. See *infra* Part VI.C.

62. See *infra* note 81.

section 187(3) provides that choice of law clauses in contracts should be read as excluding renvoi unless the parties expressly adopt renvoi.<sup>63</sup>

## VI. OTHER FUNCTIONAL CONSIDERATIONS

### A. Characterization

Characterization is the process of labeling, defining, or categorizing the facts and legal concepts in a lawsuit. It exists in all lawsuits, but has two special functions in choice of law situations. First, characterizing a claim as tort rather than contract may change the forum's choice of law.<sup>64</sup> Similarly, characterizing an issue as procedural rather than substantive may bring that issue under forum procedural law instead of foreign substantive law.

Characterization's second special function for choice of law is the determination of which law controls the characterization of a lawsuit's facts and issues. The *Restatement (Second)* provides that forum law controls the characterization of "the form of the action" (e.g., law versus equity or contract versus tort) and the conflict of laws issues.<sup>65</sup> Forum law also controls several traditionally procedural issues, especially those regarding the conduct of the litigation.<sup>66</sup> All other issues, concepts, and legal terms are characterized by the law governing that issue (i.e., the law chosen by the forum state's choice of law rule).<sup>67</sup> The *Restatement (Second)* prefers this flexible approach to characterization, and avoids rigid labels that would determine choice of law without considering the particular issue's function in the lawsuit.<sup>68</sup> This approach allows foreign law to play a determining role to insure that foreign-based claims are not cut short on their substantive content by the forum's contrary characterizations. However, the *Restatement (Second)*'s flexible characterization can be difficult in some cases. If the court finds it too difficult to characterize a particular issue under foreign law, it should use forum law for practicality.<sup>69</sup>

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63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1988).

64. As with most choice of law theories, the *Restatement (Second)* uses different rules for contract choice of law than for tort. In many situations having both tort and contract elements, the contract elements will have occurred in one state and the tort elements in another. See, e.g., *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420 n.4, 421 (Tex. 1984). Thus, characterizing the claim as one of contract may produce a different choice than if the claim were in tort.

65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 7(2), 124 (1988).

66. *Id.* § 122.

67. *Id.* § 7(3); George, *supra* note 1, at 804 n.60.

68. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (1988).

69. Two examples of problems with the characterization approach that the *Restatement (Second)* employs are:

(1) Choice of law for contract cases sometimes turns on whether the dispute relates to the contract's validity or its performance. If the issue is validity, the law of the place of the

Characterization is the first step in any choice of law analysis — indeed in any lawsuit. Characterization could have been the first step of the analysis proposed in this Article. Nevertheless, it is not because in most cases characterization is effortless. In difficult cases, however, characterization may provide an escape from an unfavorable law.

### B. *Dépeçage*

*Dépeçage* is the practice of splitting multiple claims in a lawsuit, or multiple issues in a claim, and applying different states' laws to the separate issues or claims.<sup>70</sup> *Dépeçage* is controlled by forum law, and is largely within the court's discretion.<sup>71</sup> Texas law requires *dépeçage*, that is, choice of law on an issue-by-issue basis.<sup>72</sup>

### C. *Renvoi*

In certain cases, forum law may direct the application of the "whole law" of the chosen state, that is, the other state's entire law, including its choice of law rules. This practice of second-tier choice of law is called *renvoi*, and is appropriate in certain limited cases where the forum wants the same legal result that would be reached by the courts of the chosen state. Sometimes *renvoi* is intended by the forum's statutory instruction to apply "the law" of the other state, instead of the clearer term "whole law."<sup>73</sup> In these ambiguous cases, the court must decide if the intent is to reach the same result as the other state's court would reach, or merely to apply the

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contract's making is preferred (though not mandated). See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 199 (1988). If the issue is performance, the law of the place of performance is preferred. *Id.* §§ 202(2), 206. The *Restatement (Second)* section 7 provides that the most appropriate substantive law ought to govern the characterization of validity and performance separately. *Id.* § 7. But how can the appropriate substantive law be applied to characterize the dispute as being one of validity or performance, when the appropriate substantive law cannot be selected until the characterization is completed? It seems that only forum law will allow the case to proceed at this point. The same circularity problem exists in some instances of substance/procedure characterization.

(2) A second characterization problem is that once the court has chosen the appropriate law for characterizing an issue, that law may be vague or incomplete. Moreover, even if the foreign law is sufficiently developed for characterizing the issue, the necessary specifics of that foreign law may be difficult for the court to find. As with the first problem, forum law is the practical alternative.

70. George, *supra* note 1, at 805.

71. *Id.*

72. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

73. See, e.g., TEX. BUS. & COM. CODE ANN. §§ 2.402(b) (Tex. UCC) (Vernon 1968); *Id.* § 4.102(b); *Id.* § 6.102(b), *repealed*, Act of June 11, 1993, 73rd Leg., R.S., ch. 570, § 16, 1993 Tex. Sess. Law Serv. 2147 (Vernon) (effective September 1, 1993).

substantive law of the other state.<sup>74</sup> Jurisdictions in the United States use renvoi sparingly, but foreign states with laws based on the Napoleonic Civil Code tend to use renvoi routinely.

Renvoi is required in some portions of the Texas Business and Commerce Code.<sup>75</sup> *Restatement (Second)* section 8 addresses renvoi, and further suggests renvoi in certain cases involving real property,<sup>76</sup> personal property,<sup>77</sup> succession of decedents' interests in movables,<sup>78</sup> and trusts.<sup>79</sup> The *Restatement (Second)* also notes the practice of renvoi in certain domicile issues.<sup>80</sup> The *Restatement (Second)*'s renvoi sections are at least persuasive, but may not be controlling in Texas unless they are officially embraced by the Texas Supreme Court, which has thus far adopted only a few sections of the *Restatement (Second)*. Federal law uses renvoi to select the applicable law for claims under the Federal Tort Claims Act.<sup>81</sup>

Courts should presume against renvoi. It should be used only when forum law expressly indicates, or when the forum's choice of law rule seeks the same result that a court in the chosen state would reach by applying its own choice of law rule.<sup>82</sup>

#### D. False Conflicts

A false conflict occurs when the laws of two or more states are the same, or produce the same result. If there are identical laws on point in all states being considered, there is no choice of law problem. The one law is applied. If there are identical laws in two or more states, but not all the states being considered, the states with identical laws should be treated as one state, adding their choice of law contacts and interests.<sup>83</sup> Remember that Texas choice of law is done on an issue-by-issue basis.<sup>84</sup> Thus, there may be false conflicts in some issues and real conflicts in other issues in the same cases. If fact, this mix will appear in most choice of law cases.

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74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1988).

75. See APPENDIX A, Nos. 2, 3, 5-8.

76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223-26, 228, 230-42 (1988).

77. *Id.* §§ 245, 248-49, 253, 255.

78. *Id.* §§ 260-63, 264(2).

79. *Id.* §§ 269, 274-75, 277-82.

80. *Id.* § 13 cmt. c.

81. 28 U.S.C. § 1346(b) (1988).

82. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1988), which discusses the presumption that where the forum's choice of law rules direct the application of "the law" of another State, it is presumed to be the local law. That is, the substantive law not including the forum's choice of law rules that would direct the choice to another State. Section 187(3) provides that unless the parties indicate otherwise, a contractual choice of law clause is presumed to select only the local law of the chosen State. See generally *id.* § 186 cmt. b (providing further discussion).

83. *Id.* § 145 cmt. i; § 186 cmt. c; see also George, *supra* note 1, at 807 n.69 (providing additional sources for a comprehensive discussion of false conflicts).

84. See *supra* note 71 and accompanying text.

One should note that the foregoing definition is from the *Restatement (Second)* and is the most common. A few jurisdictions using Currie's "government interest analysis"<sup>85</sup> define false conflicts as those in which only one state has a real interest (with state interest calculated sometimes on the existence of state law on point, sometimes on the state's contacts with the dispute, and sometimes on other factors). Avoid this interest-based definition unless the forum uses governmental interest analysis.

## VII. FEDERAL COURTS

The fundamental choice of law problem in federal courts is whether State or federal law will govern a particular issue in a case. The *Erie* Doctrine<sup>86</sup> attempts to resolve this. This Article does not discuss *Erie* problems in depth because *Erie* analysis differs from traditional territorial choice of law, with quite distinct analytical elements. Because *Erie* problems are distinct, they are excluded from the *Restatement (Second)*'s choice of law rules.<sup>87</sup> While this Article does not provide an *Erie* analysis, the following generalizations apply to federal court choice of law where the *Erie* problems are already resolved. These generalizations are directed only to choice of substantive law, as is this entire Article.<sup>88</sup>

### A. Diversity Cases

*Erie* mandates that substantive issues in diversity cases be governed not by federal law, but by the law of the State in which the federal court is located, including that State's choice of law rules. Thus, federal courts sitting in diversity cases will apply State or foreign country law to substantive issues, as directed by the local State's choice of law rules.<sup>89</sup>

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85. See *infra* note 94 and accompanying text.

86. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The source for *Erie*-type problems is the Rules of Decision Act, adopted in 1789, now codified as 28 U.S.C. § 1652 (1988). Although seldom cited, it is the primary federal choice of law rule, providing that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.* From this premise, the *Erie* Doctrine now controls the conflict of federal and State law in federal courts. 304 U.S. at 71. The current *Erie* test is stated in *Hanna v. Plumer*, 380 U.S. 460 (1965).

87. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (1988).

88. Traditional choice of law inquiry focuses on substantive law, assuming that forum law will govern procedure. *But see* Part VIII.A (discussing the role of procedural issues in choice of law). This traditional practice is followed in courts of general jurisdiction in the United States, but not in federal courts. There, the Federal Rules of Civil Procedure are subject to *Erie* analysis. The issue is then determined by the law selected by the *Erie* process. See 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §§ 4501-15 (1982); see also *infra* note 103 (discussing the *Erie* test).

89. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

One exception is for diversity cases transferred from a federal court in another State under federal venue law;<sup>90</sup> in these cases the first State's choice of law rule is used.<sup>91</sup>

### *B. Federal Claims*

Federal claims should not involve a traditional choice of law analysis. Substantive issues in federal claims (based on the Constitution, federal statutes or regulations, federal common law, treaties, or public international law) are usually governed by the appropriate federal law, or by the law chosen by a specific federal choice of law rule.<sup>92</sup> Some substantive issues in these cases may be governed by State law because of an *Erie* ruling (or because the particular federal law has gaps that require "borrowing" from State law), and not because of a territorial choice of law rule.

## VIII. WHAT IF TEXAS IS NOT YOUR FORUM?

When litigating in any other forum, in or out of the United States, the basic steps in this Article should apply if adjusted to that forum's law and vantage point.

### *A. Choice of Law in Other States in the United States*

First identify the forum; then identify the forum's pertinent choice of law rules. Using the process in this article, that search would follow these steps:

(1) Forum statutes linked to specific substantive areas.<sup>93</sup> If no statute applies, then a . . .

(2) Valid choice of law agreement between the parties, if the forum honors such clauses at all (most do for most contracts), and if this particular contract is not excluded.<sup>94</sup> If neither of the above apply, then look to . . .

(3) The forum's general choice of law rule, which should be part of the State's common law. In addition to the most significant relationship test, some of the other choice of law systems used in the United States are:

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90. 28 U.S.C. § 1404 (1988).

91. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 n.8 (1981).

92. See APPENDIX A, Nos. 22-26.

93. See APPENDIX A for examples of Texas choice of law statutes for specific areas.

94. See, e.g., TEX. BUS. & COM. CODE ANN. § 35.53 (Vernon Supp. 1994) (set forth in APPENDIX A, *infra*); TEX. INS. CODE ANN. art. 21.42 (Vernon 1981) (set forth in APPENDIX A, *infra*); *supra* note 20 and accompanying text.

(a) Currie's "government interest analysis" (California, New Jersey), which seeks to identify the State having the greatest interest in the lawsuit, and measures state interest by the State's law and policy on point, and the pertinence of that law and policy to the facts of the case. (Note that a version of interest analysis appears in factors 2 and 3 of the most significant relationship test.)<sup>95</sup>

(b) Leflar's "Choice Influencing Considerations" (Minnesota, New Hampshire, Wisconsin), which resembles the *Restatement (Second)*'s most significant relationship test. In fact, both tests were inspired by a 1952 article by Elliot Cheatham and Willis Reese.<sup>96</sup> Reese was the principle architect of the *Restatement (Second)* and the most significant relationship test.<sup>97</sup>

(c) The *lex loci*, or vested rights, theories in the original *Restatement, Conflict of Laws*, are still used in about twenty States. These theories focus on the location of a key event, rather than the more modern focus on expectation of the parties, state interests, and other factors. *Lex loci* rules include the familiar "law of the place of the wrong" to govern torts.<sup>98</sup> Many of these old rules are retained in the *Restatement (Second)* as presumptions of which law should apply unless another state has a more significant relationship to the parties or the occurrence.<sup>99</sup>

A State may use one choice of law system for torts and another for contracts. For example, Florida applies the First Restatement's vested rights rules to contract cases, and the *Restatement (Second)*'s most significant relationship test to torts. Indiana, New Hampshire, New Jersey, and the District of Columbia have also split choice of law for contracts and torts.<sup>100</sup>

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95. For a discussion of Currie's views, see WILLIS L.M. REESE ET AL., *CONFLICT OF LAWS* 487-89 (9th ed. 1990) and ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 263-64, 267-70 (4th ed. 1986).

96. Elliot E. Cheatham and Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

97. See generally LEFLAR, *supra* note 94, at 277-79 (discussing the academic origins of "choice influencing considerations").

98. See RESTATEMENT OF CONFLICT OF LAWS (1934).

99. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1988) (mandating the application of the law of the situs of the injury unless some other state has a more significant relationship under the factors of *Restatement (Second)* § 6).

100. For a complete description of United States choice of law systems, see Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987); Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983). Note that these two articles are surveys of a difficult area of law, and while informative, are not necessarily accurate or up to date.



#### (4) United States Constitution

Follow the constitutional analysis stated above.<sup>101</sup> Under due process, ask whether there is a sufficient or reasonable connection between the dispute and the state whose law is being applied.<sup>102</sup> Under full faith and credit, ask if the forum properly evaluated the interests of all concerned States to determine if one State's interest sufficiently predominates so that its law must be applied.<sup>103</sup> For other clauses inquire whether this is a rare case in which Equal Protection, Privileges and Immunities, or another constitutional clause might direct choice of law.<sup>104</sup>

### B. Choice of Law in Foreign Countries

As with other States in the United States, the first step in choice of law analysis for foreign countries is to identify the specific forum, e.g. is it a Canadian *federal* court or a *provincial* court in Ontario? Once you have specified the forum, identify the forum's pertinent choice of law rules. To find the choice of law rules, look to:

(1) *Legislation*, which is used in most civil-law jurisdictions for choice of law rules;

(2) *Common law, case precedent, or custom*;

(3) *Constitutional rules*, similar to the due process and full faith and credit limits on choice of law in State and federal courts in the United States, which may also exist in foreign countries; and

(4) *Treaties and conventions*: For choice of law purposes, there are three kinds of treaties:

(a) Dispositive treaties with no choice of law rules, such as the United Nations Convention on Contracts for the International Sale of Goods;<sup>105</sup>

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Smith's more recent article is accurate on Texas' use of the most significant relationship test, but is only roughly accurate in its analysis of Texas courts' application of the test. Readers should use these articles as starting points for further research into any particular State's choice of law rules.

101. See *supra* notes 42-48 and accompanying text.

102. See *supra* note 42.

103. See *supra* notes 43-44 and accompanying text.

104. See *supra* notes 45-48 and accompanying text.

105. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (1980), 19 I.L.M. 668 (1980) (entered into force Jan. 1, 1988). The Convention is loosely comparable to an "international U.C.C. Article 2." Article 7(2) of the Convention provides that questions not resolved by the Convention are to be settled in conformity with "the law applicable by virtue of the rules of private international law," 19 I.L.M. at 673, that is, the rules of conflict of laws. This presumably refers to the forum's private international law rules, but the Convention is not clear on this. Whether it invokes the forum's rules or not, Article 7(2) is not a true choice of law rule because it does not select the applicable law or provide any criteria as to how to select it. Instead, it merely states the obvious — that issues outside the Convention will be resolved by conflict of law rules.

(b) *Treaties that are mostly dispositive law*, but that include choice of law rules, such as the Warsaw Convention,<sup>106</sup>

(c) *Choice of law treaties with few or no dispositive provisions*. An example is the not-yet-enacted European Community Convention on the Law Applicable to Contractual Obligations,<sup>107</sup> which uses the concept of "closest connection" as evidenced by the "characteristic performance"<sup>108</sup> to choose the governing law. This standard may appear to resemble the *Restatement (Second)*'s most significant relationship test, but attorneys should not hastily equate the two.<sup>109</sup> Other examples are the various Inter-American Conventions on Private International Law.<sup>110</sup>

Note also that this Convention is an example of "vertical choice of law" as opposed to the horizontal choice of law discussed in this article. Vertical choice of law is a conflict between two overlapping authorities, such as the Texas Legislature and the United States Congress. In the United States, two vertical choice of law rules apply to such conflicts:

(1) The Supremacy Clause of the United States Constitution dictates that where applicable, federal *substantive* law preempts State *substantive* law.

(2) The *Erie* Doctrine provides that where federal *procedure* conflicts with State law (either *substance* or *procedure*), that:

(a) a pertinent Federal Rule of Civil Procedure or Federal Rule of Evidence will apply over conflicting State law, provided that the Rule does not abridge, enlarge or modify a substantive right. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); 28 U.S.C. 2072 (1988 & Supp. II 1990);

(b) if the conflict is between a federal procedure not found in the Federal Rules of Civil Procedure or the Federal Rules of Evidence, then the court must balance State and federal interests, including in the balance whether the State law is outcome determinative (if so, the scale tips toward the State, if not, the scale tips toward federal interests), bearing in mind the twin aims of *Erie*: preventing forum shopping and promoting the equitable administration of justice. 380 U.S. at 467-69.

The Convention on the International Sale of Goods is an example of the Supremacy Clause's vertical preemption of State substantive law. With the Convention, the preempted State law will most often be UCC Article 2.

106. Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), opened for signature Oct. 12, 1929, 49 STAT. 3000, 137 L.N.T.S. 11. See, e.g., *id.* at art. 29(2) (applying forum law to the calculation of the two-year limitations period set up under article 29(1)).

107. Council Convention on the Law Applicable to Contractual Obligations, 23 O.J. EUR. COMM. (No. L 266) 1 (1980), signed in Rome on June 19, 1980 (not yet ratified) [hereinafter "European Convention"], reprinted in ERIC STEIN ET AL., EUROPEAN COMMUNITY LAWS AND INSTITUTIONS IN PERSPECTIVE, 467-75 (Supp. 1985) [hereinafter "EUROPEAN COMMUNITY LAWS"].

108. European Convention, *supra* note 106, art. 4.

109. See EUROPEAN COMMUNITY LAWS, *supra* note 106, at 198-99.

110. The Inter-American conventions were passed at four conferences, enacting nineteen conventions and various protocols regarding choice of law for a number of matters (along with other conflict of laws areas such as discovery, judgment enforcement, child abduction and other matters). See Inter-American Specialized Conference on Private International Law: Six Inter-American Conventions, Jan. 30, 1975, 14 I.L.M. 325; Second Inter-American Specialized Conference on Private International Law, May 8, 1979, 18 I.L.M. 1211; Third Inter-American Specialized Conference on Private International Law: Conventions and Additional Protocol, May 24, 1984, 24 I.L.M. 459; Organization of American States: Fourth Inter-American Specialized Conference on Private International Law, July 15, 1989, 29

Some or all of these rules may apply, depending on the type of jurisdiction and culture. Although *renvoi* is popular in some jurisdictions, do not use it unless forum law directs its use. In some countries (as well as Kentucky and Michigan in tort cases)<sup>111</sup> the choice of law rule is *lex fori*, that is, the forum applies its own law. In that situation, you might want to argue the applicability of the following section (although international law probably will not get around Kentucky's *lex fori* rule).

## IX. INTERNATIONAL LAW CONSIDERATIONS

International law offers guidance on choice of law in the form of limits placed on states' legislative jurisdiction (i.e., a state's power to regulate conduct within and outside the state's territory). Known in international law as "prescriptive jurisdiction," these limits are similar to the constitutional choice of law limits imposed on State and federal forums in the United States. In discussing these limits, we must first distinguish between public and private international law.

"Private international law" is the term for conflict of laws in the United Kingdom and most civil-law jurisdictions. It encompasses issues of judicial jurisdiction, choice of law, and the recognition and enforcement of foreign judgments. Thus defined, private international law is choice of law. Because the term is synonymous with the topic this article has addressed thus far, private international law offers nothing further except additional choice of law theories to be studied on a forum-by-forum basis.

"Public international law," on the other hand, is the source for the additional limits on choice of law. Formerly known as "the law of nations," public international law is "the law of the international community of states."<sup>112</sup> International law derives from the treaties and

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I.L.M. 62. Particularly on point are: Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, *opened for signature* Jan. 30, 1975, 14 I.L.M. 332; Inter-American Convention on Conflict of Laws Concerning Checks, *opened for signature* Jan. 30, 1975, 14 I.L.M. 334; [a second] Inter-American Convention on Conflict of Laws Concerning Checks, *opened for signature* May 8, 1975, 18 I.L.M. 1220; Inter-American Convention on Conflict of Laws Concerning Commercial Companies, *opened for signature* May 8, 1975, 18 I.L.M. 1222; Inter-American Convention on Proof of and Information on Foreign Law, *opened for signature* May 8, 1975, 18 I.L.M. 1231; Inter-American Convention on Domicile of Natural Persons in Private International Law, *opened for signature* May 8, 1975, 18 I.L.M. 1234; Inter-American Convention on General Rules of Private International Law, *opened for signature* May 8, 1975, 18 I.L.M. 1236; Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, *opened for signature* May 24, 1984, 24 I.L.M. 460; Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, *opened for signature* May 24, 1984, 24 I.L.M. 465; Inter-American Convention on Contracts for the International Carriage of Goods by Road, *opened for signature* July 15, 1989, 29 I.L.M. 81.

111. See *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967), *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 842 (Mi. 1982), and other cases discussed in Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 579-81 (1983).

112. RESTATEMENT (THIRD) FOREIGN RELATION, *supra* note 13, § 16 (1986).

customs that regulate the conduct of nation-states in their relations with each other, and to some extent, in their relations with individuals, business associations, and other entities.<sup>113</sup> Some have disputed its nature as "true law" because it lacks a vertical authority and enforcement structure. But to the extent the advocate needs additional arguments for choice of law, public international law offers useful, though often unenforceable, rules limiting states' choice of law. This Article will briefly describe those limits in two settings, and conclude with special rules under United States law for addressing certain transnational choice of law issues.

#### *A. Choice of Law in a True International Forum*

For the most part, there is no choice of law in a public international forum. The primary forum for public international law is the International Court of Justice at The Hague, Netherlands. It uses "forum law," that is, public international law. However, public international law is sometimes supplemented by "general principles of law." These are legal norms drawn from nation-states' laws to fill in gaps in international law. When national laws offer conflicting choices for a general principles of law issue, the selection process is similar to Leflar's "better rule of law" process.<sup>114</sup>

Other public international law forums include any judicial body convened by the United Nations, regional human rights courts such as the Inter-American Court of Human Rights, and special arbitral bodies such as the Iran-U.S. Claims Tribunal.

#### *B. Public International Law on Choice of Law in Private Disputes*

Public international law is, for the most part, the substantive law that regulates nation-states' behavior for actions done in an official or governmental capacity. But it also provides jurisdictional limits on nation-states' courts both in civil and criminal disputes. This Article is directed only to the choice of law limits on private civil disputes, that is, cases involving nongovernmental parties, or governmental parties acting in a private or commercial capacity.

##### *1. Five Principles of Prescriptive (or Legislative) Jurisdiction*

International law's limits on choice of law in private disputes are known as "prescriptive jurisdiction," and are based on five principles of state authority. These five principles apply both to civil and criminal cases,

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113. *Id.*

114. See APPENDIX B.

although some seem particularly suited to criminal cases. In any given case, the state whose substantive law is selected by the forum to govern the rights and liabilities of the parties must satisfy at least one (many will satisfy more than one) of the following principles:

*The Territorial Principle:* A state has jurisdiction to prescribe law as to: (a) conduct within its territory; and (b) the status of persons or things within its territory.<sup>115</sup>

*The Nationality Principle:* A state has jurisdiction to prescribe law as to conduct outside its territory relating to the activities, interests, status, or relations of its nationals who are located outside as well as within its territory.<sup>116</sup> This principle is sometimes divided into two principles: *Nationality*<sup>117</sup> for the direct regulation of the conduct of nationals and *passive personality*<sup>118</sup> for the regulation of the conduct of nonnationals who act against nationals, whether within or outside the regulating state's territory.

*The Effects (or Objective Territoriality) Principle:* A state has jurisdiction to prescribe law as to conduct outside the territory that has or is intended to have effects within the territory.<sup>119</sup> That is, Spain has jurisdiction over someone standing in France who fires a shot into Spain and hits someone. The scope of Spain's jurisdiction is not only to adjudicate the victim's claim, but under prescriptive jurisdiction, to apply Spanish substantive law.<sup>120</sup>

*The National Security Principle:* A state has jurisdiction to prescribe law as to conduct outside its territory by persons not its nationals that is directed against the security of the state or against a

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115. RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 402(1) (a) & (b); *see also*, *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (applying territorial principle as a matter of general principle).

116. RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 402(2).

117. For examples of jurisdiction over individual persons based on their status as United States nationals, *see Blackmer v. United States*, 284 U.S. 421, 443 (1932) and *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952). This base of prescriptive jurisdiction extends to corporate persons that are incorporated in the forum, *see, e.g.*, United States Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to 2 (1988); RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 414, but is questionable when applied to corporations merely owned by nationals of the forum, *see* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13 § 414(2).

118. Passive personality, the concept of applying forum law to the conduct of a party having no contact with the forum, on the basis of that party's injury to a foreign national outside the forum, is often criticized but still viable in certain instances. *See, e.g.*, 18 U.S.C. § 77 (1988); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 402 cmt. g (noting that the principle is being increasingly applied to organized terrorist attacks on a state's nationals and assassinations of a state's diplomatic representatives or other officials).

119. RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 402(1)(c).

120. *E.g.*, *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 610 (9th Cir. 1976).

limited class of other state interests.<sup>121</sup> This jurisdiction is inherently for criminal prosecution, but not limited to criminal actions. Examples of state security interests include counterfeiting of currency, stamps, passports, and other acts undermining the state's security or economy.

*The Universality Principle:* A state has jurisdiction to define offenses and prescribe punishment for certain offenses of universal concern such as piracy, slave trade, hijacking of aircraft, genocide, war crimes, and perhaps other terroristic acts, even though none of the other principles of jurisdiction (territoriality, nationality, effects, national security) is present.<sup>122</sup>

Note that the *Restatement (Third) Foreign Relations* also has specific provisions limiting prescriptive jurisdiction over tax, securities, and antitrust cases.<sup>123</sup>

## 2. Reasonableness

All of the foregoing principles of prescriptive jurisdiction, except for universality, are further governed by a principle of reasonableness. As stated in *Restatement (Third) Foreign Relations* section 403, reasonableness is determined by the links to the state whose law is to be applied, looking to factors such as where the conduct occurred, who was involved, other states' interests, and additional factors listed in section 403.<sup>124</sup> Note that section 403's reasonableness standard resembles the due process and full faith and credit limits on legislative jurisdiction in the United States Constitution.

Thus, if the forum's choice of law rule points to a state with an unfavorable law (most often its own law), and the forum lacks due process-type safeguards,<sup>125</sup> you may argue that international law prohibits the application of any state's law that (1) fails to satisfy one of the five principles and (2) is unreasonable under the standards in section 403.

The need for section 403's reasonableness standard should occur only outside the United States, in states that lack due process safeguards. This is not to suggest that our own States will never make an unreasonable choice of law.<sup>126</sup> But when they do, due process provides as strong an argument as section 403. Nonetheless, section 403 may be asserted in State and federal courts. Federal courts must adhere to international law as a

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121. RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 402(3).

122. *Id.* § 404; see *Filártiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

123. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, §§ 411-16.

124. *Id.* § 403.

125. See *supra* note 42 and accompanying text.

126. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985).

matter of federal common law;<sup>127</sup> State courts must do so under the Supremacy Clause.<sup>128</sup>

### 3. Remedies for Noncompliance

#### a. Political

As discussed above, international law's limits on the forum's choice of law are arguments of last resort. In an unfriendly forum, these arguments may not work. If the forum disregards these principles by applying a law that lacks a reasonable relation to the dispute, the only immediate remedy is political, by either: (1) seeking your government's diplomatic intervention to protest the unfair litigation (unlikely); or (2) requesting that your government bring an action in your interest in the International Court of Justice (also unlikely).

#### b. Blocking Enforcement of the Judgment in Other Forums

Another remedy, perhaps the only realistic one, is blocking the enforcement of the unfriendly forum's judgment in other states. Public international law provides that absent a treaty, foreign judgments are enforced under the weak, nonbinding doctrine of comity. Comity is more political goodwill than a rule of law, but nonetheless provides for nonenforcement of a questionable judgment on the basis of public policy.<sup>129</sup> Thus, you may be able to persuade the enforcing forum to disregard another forum's judgment on the grounds that an unreasonable choice of law violates the enforcing forum's public policy.

In the United States, foreign judgment enforcement is a question of State law in both State and federal courts.<sup>130</sup> International law's comity standards are still sometimes applied, but only as a matter of forum law. Texas and many other States use the Uniform Foreign Money-Judgment Recognition Act ("UFMJRA").<sup>131</sup> The UFMJRA has no express defense to enforcement based on a suspect choice of law by the first forum. It does, however, provide for nonrecognition if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compati-

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127. *The Paquete Habana*, 175 U.S. 677, 700, 708 (1900).

128. *Sei Fujii v. California*, 242 P.2d 617, 619-20 (Cal. 1952); RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 131.

129. See SCOLES & HAY, *supra* note 16, at 11-15 (2d ed. 1992).

130. See, e.g., *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1003-04 (5th Cir. 1990); RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 481 cmt. a.

131. UNIFORM FOREIGN MONEY-JUDGMENT RECOGNITION ACT §§ 1-11, 13 U.L.A. 263 (1962) [hereinafter UFMJRA]; TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon 1986 & Supp. 1994) (Texas UFMJRA).

ble with the requirements of due process of law."<sup>132</sup> Although no UFMJRA cases have addressed a choice of law challenge, it is clear that due process requires a reasonable connection between the dispute and the state whose law is applied to that dispute.<sup>133</sup> The UFMJRA also provides a public policy defense to enforcement,<sup>134</sup> which could arguably be asserted against an unreasonable choice of law. Readers should note that the UFMJRA applies to *foreign country* judgments only, and is not the uniform act for recognition of judgments from other States in the United States.<sup>135</sup>

According to the two European conventions on the enforcement of foreign judgments, the judgment forum ("F-1") choice of law may be objected to in the enforcing forum ("F-2"), but only as to preliminary choice of law questions relating to capacity, marital status and inheritance.<sup>136</sup> Of course, the judgment may also be challenged on grounds of personal jurisdiction, subject matter jurisdiction, finality, and preclusion (*res judicata*), under the UFMJRA and the European conventions.

Of course, preclusion (*res judicata*) will operate in favor of the F-1 judgment creditor. The F-1 creditor may choose to bypass the UFMJRA and instead file a new lawsuit in F-2, and use the F-1 judgment as a basis for summary judgment in F-2. If this happens, and if the defendant fully defended in F-1, the defendant may have to show fraud or fundamental unfairness in the F-1 judgment to defeat its preclusive effect in F-2.

### C. Specific United States Choice of Law Rules for Certain Transnational Issues

#### 1. Treaties and Conventions

Where the United States is concerned, treaties and conventions tend to be more substantive than procedural,<sup>137</sup> and therefore do not involve

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132. UFMJRA, *supra* note 130, § 4(a)(1).

133. See *supra* note 42 and accompanying text.

134. UFMJRA, *supra* note 130, § 4(b)(3).

135. See *id.* § 1.

136. See European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 27.4, O.J. L304/77 (Oct. 30, 1978), 8 I.L.M. 229, 236 (entered into force Feb. 1, 1973) [hereinafter "the Brussels Convention"]; European Communities—European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 27.4, O.J. (L 319) 9, 28 I.L.M. 620, 629 (not yet ratified) [hereinafter the "Lugano Convention"]. Note that the two conventions govern different free trade areas: the Brussels Convention governs the ECC states (the Common Market), while the Lugano Convention governs the EFTA states (Austria, Finland, Iceland, Norway, Sweden, and Switzerland). The Lugano Convention closely follows its Brussels counterpart, and together, the two will eventually provide the same rules for 18 European states. See generally ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 420-56 (1993) (discussing the recognition of foreign judgments in Europe).

137. The United States has been reluctant to sign treaties and conventions in many areas,



choice of law rules. However, the United States has specific choice of law rules in a few treaties and conventions, such as the Warsaw Convention.<sup>138</sup> To the extent that State court choice of law rules are contrary to the treaty, the treaty controls under the Supremacy Clause. Because State choice of law rules do not apply to actions arising under federal law, and treaties are federal law even when applied to private transactions, collisions between State and treaty choice of law rules should be rare.<sup>139</sup>

## 2. Act of State Doctrine

The United States has a choice of law rule — the Act of State Doctrine — for certain cases involving disputes arising from or involving foreign governmental action. The foremost precedent is *Banco Nacional de Cuba v. Sabbatino*,<sup>140</sup> an action for compensation resulting from Castro's nationalization of private property. The United States Supreme Court used *Sabbatino* to restate the precedent that courts in the United States cannot review the legality of a foreign government action.<sup>141</sup>

Congress immediately acted to limit *Sabbatino's* effect in nationalization cases with the Second Hickenlooper Amendment to the Foreign Assistance Act.<sup>142</sup> It provides that courts may not apply the Act of State Doctrine as stated in *Sabbatino* to any taking that violates international law.<sup>143</sup> The law specifically excludes, however: (1) acts of state not in violation of international law; (2) claims of title or right to irrevocable letters of credit of not more than 180 days duration issued in good faith prior to the confiscation; and (3) any case where the President has determined that the Act of State Doctrine is necessary to United States foreign policy interests.<sup>144</sup>

Courts have held that the Hickenlooper Amendment applies to confiscated property before the court, but it does not apply to property not before the court.<sup>145</sup>

Because the Hickenlooper Amendment applies only to confiscation cases, the Act of State Doctrine has full effect in nontaking cases, such as

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including those providing remedies involving foreign courts, or the application of foreign law.

138. See *supra* note 105.

139. U.S. CONST. art. III; 28 U.S.C. § 1331 (1988).

140. 376 U.S. 398 (1964).

141. *Id.* at 428.

142. 22 U.S.C. § 2370(e) (1988); see generally RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 444 cmts. a, b, c, e, and reporters' note 4 (discussing adoption of the Second Hickenlooper Amendment).

143. 22 U.S.C. § 2370(c).

144. *Id.*

145. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 444 cmts. a, e, and reporters' note 4.

*Underhill v. Hernandez*,<sup>146</sup> a case involving damages for assault and false arrest by a foreign military commander.<sup>147</sup>

The Act of State Doctrine may appear to be a sovereign immunity rule, but leading commentators label it a choice of law rule.<sup>148</sup> As such, the rule is that parties' rights in a dispute involving foreign governmental action will be determined by the law of the state committing the act, provided that the act occurred within the territory of the foreign government.<sup>149</sup>

Note that the Act of State Doctrine is United States domestic law—it is not international law. Thus, courts in foreign countries are not bound by the Doctrine, and may adjudicate the legality of a United States governmental act unless constrained by political interests or a different sovereign immunity rule.<sup>150</sup> Although not a rule of international law, the Doctrine is applied in similar forms by English courts and a few other jurisdictions.<sup>151</sup>

## X. CONCLUSION

For Texas state and federal practice, this Article will spot most choice of law issues and suggest solutions to many. For forums outside of Texas, this Article attempts no answers but does offer a formula approach to ascertaining that forum's perspective on choice of law. Readers should note, however, that this is no more than a starting point for research on any particular choice of law problem.

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146. 168 U.S. 250 (1897).

147. For other nontaking cases, see RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 13, § 444 cmt. c and reporters' notes 3, 7.

148. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223-24 (1972). *Sabbatino* also held that the Act of State Doctrine was not compelled by the Constitution, but that it had "constitutional underpinnings" in the Separation of Powers Clause (restricting the judicial branch from interfering with the executive's interests in foreign affairs). *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

149. 376 U.S. at 416.

150. *Id.* at 421.

151. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 507-08 (4th ed. 1990) (noting the recent reluctance of English courts to apply the Doctrine in confiscation cases).

## XI. APPENDIX A: SELECTED CHOICE OF LAW STATUTES

Section 6 of the *Restatement (Second)* provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." *Restatement (Second)* section 6(2) applies only where there is no specific statutory directive. The following are specific statutory choice of law rules in Texas:

1. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon Supp. 1994). This statute honors the parties' choice of law in a UCC-governed contract, subject to the exceptions in § 1.105(b) below.

2. TEX. BUS. & COM. CODE ANN. § 1.105(b) (Tex. UCC) (Vernon Supp. 1994). This section provides that the parties' choice of law in section 1.105(a) does not override the contrary provisions in sections 2.402, 4.102, 8.106, and 9.103, which are also choice of law statutes. Section 1.105(b) also provides that the law indicated by those subsequent UCC choice of law rules will include the "whole law" of the referent state, including its choice of law rule (*i.e.*, § 1.105(b) calls for *renvoi*).

3. TEX. BUS. & COM. CODE ANN. § 2.402(b) (Tex. UCC) (Vernon 1968). At the creditor's option, the [whole] law of the state where the goods are situated applies to certain issues involving creditors' rights against sold goods.

4. TEX. BUS. & COM. CODE ANN. § 3.509(a) (Tex. UCC) (Vernon 1968). The law (substantive law only) of the place of dishonor governs the authority of the person to certify a payee's protest of a commercial paper's dishonor.

5. TEX. BUS. & COM. CODE ANN. § 4.102(b) (Tex. UCC) (Vernon 1968). The [whole] law of the place where the bank is located applies to issues involving bank liability for action or non-action regarding presentment, payment, or collection.

6. TEX. BUS. & COM. CODE ANN. § 6.102 (Tex. UCC) (Vernon 1968) (repealed). The forum's [whole] law applies to cases involving bulk transfers of goods located in Texas. This statute was repealed effective September 1, 1993. Act of June 11, 1993, 73rd Leg., R.S., ch. 570, § 16, 1993 Tex. Sess. Law Serv. 2147 (Vernon).

7. TEX. BUS. & COM. CODE ANN. § 8.106 (Tex. UCC) (Vernon 1991). The whole law of "the jurisdiction of organization of the issuer" applies in cases involving the validity, effectiveness of registration, and issuer's rights and duties regarding investment securities.

8. TEX. BUS. & COM. CODE ANN. § 9.103 (Tex. UCC) (Vernon 1991). The [whole] law of various designated jurisdictions

applies in cases involving the perfection of security interests in multi-state transactions.

“Whole law” in the above UCC sections means the substantive law plus the choice of law rule of that state (i.e., *renvoi*). Where “whole” is bracketed, it is unexpressed in that section but imposed by section 1.105(b). In section 8.106, where “whole” is not bracketed, it is express in the statute.

9. TEX. BUS. & COM. CODE ANN. § 33.09 (Vernon 1987). Section 33.09 provides that the rights and duties of a corporation and its transfer agents in registering a security or in making a transfer of a security pursuant to a fiduciary’s assignment are governed by the law of the jurisdiction under whose laws the corporation is organized, and providing further that for the purposes of this Act, a National Banking Association is deemed to have been organized in the State in which its principal banking house is located.

10. TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon Supp. 1994). Enacted by the Texas legislature in 1993, this section provides that parties to a “qualified transaction” may designate as governing law (both as to validity and enforceability) the law of any jurisdiction (presumably a State or foreign country) that bears a reasonable relationship to the transaction, even if the chosen law is contrary to Texas public policy. In certain instances the parties may choose the law of a jurisdiction that does not bear a reasonable relation to the transaction. *Id.* § 35.51. The statute defines “transaction” and “qualified transaction,” lists five alternatives that create a reasonable relation between the transaction and the chosen jurisdiction, is expressly subordinated to other specific choice of law statutes under Texas and federal law, and has other provisions that will significantly affect the drafting of choice of law clauses in Texas. *Id.*

11. TEX. BUS. & COM. CODE ANN. § 35.52 (Vernon Supp. 1994). Also enacted in 1993, this section is substantially similar to the former section 35.53(c) and provides that certain defined construction contracts for the construction or repair of improvements to real property located in Texas which have a choice of law clause designating the law of another state are voidable, as to the choice of law clause, by the party that is obligated to perform.

12. TEX. BUS. & COM. CODE ANN. § 35.53 (Vernon Supp. 1994). This section requires that a limited class of contracts with choice of law clauses choosing the law of another state must designate those clauses “conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise

set out in such a manner that a reasonable person against whom the provision may operate would notice." *Id.* § 35.53(b). This is not a true choice of law statute in that it does not designate the law applicable to a specific claim or transaction. It does, however, affect the validity of a limited group of contractual choice of law clauses. Although this Article does not discuss forum selection clauses, readers should note that section 35.53(b) requires the same notice for contractual clauses designating the site of litigation or arbitration.

It is interesting to note that section 35.51 refers to parties choosing the law of another "jurisdiction," while section 35.53 applies to parties choosing the law of another "state." The author assumes that both "jurisdiction" and "state" refer to any State or territory in the United States as well as any foreign country.

13. TEX. BUS. CORP. ACT. art. 8.02 (Vernon Supp. 1994), providing that a foreign corporation will have the same but no greater rights, privileges and liabilities as a domestic corporation, except as to (1) internal affairs, and (2) piercing the veil, both of which are governed by the law of the state of incorporation.

14. TEX. CIV. PRAC. & REM. CODE ANN. § 16.066 (Vernon 1986). A Texas action on a foreign judgment is barred if the action would be barred under the laws of the rendering jurisdiction.

15. TEX. CIV. PRAC. & REM. CODE ANN. § 16.067 (Vernon 1986). A person may not bring a claim against a person who has moved to Texas if the claim is barred by the statute of limitations of the State or foreign country from which the person came.

The two preceding statutes are examples of "borrowing statutes," that is, Texas limitations statutes that borrow the limitations rule of another state. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 58-66 (3d ed. 1986).

16. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.003, 71.031 (Vernon 1986). These sections provide for choice of law in wrongful death actions involving acts or deaths outside of Texas.

17. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981). Texas law governs certain local insurance contracts notwithstanding the contract's designation of execution or performance in another state.

18. TEX. INS. CODE ANN. art. 21.43(e), § 7(c) (Vernon Supp. 1994). A foreign casualty insurer does not have to make the deposit required by Texas law if the insurer has made a similar deposit in any other State, under that State's law, and in a manner that secures equally all policyholders who are citizens and residents of the United States.

19. TEX. FAM. CODE ANN. §§ 14.71, 21.07 (Vernon 1986 & Supp. 1994). This section provides for choice of law in enforcement of foreign child support decrees.

20. TEX. REV. CIV. STAT. ANN. art. 852a, § 9.03 (Vernon 1964). Any contract made by any foreign savings and loan association with any Texas citizen shall be deemed a Texas contract and construed under Texas law.

21. TEX. LOC. GOV'T CODE ANN. § 361.028 (Vernon 1988). This statute provides for the applicable law in various situations in the joint two-state operation of justice centers in border counties. In particular, the section provides that if it is impossible for a person to conform his or her conduct in the justice center to the laws of both states, that person may choose which state's law governs that conduct.

22. TEX. REV. CIV. STAT. ANN. art. 8308-3.14 to 3.16 (Vernon Supp. 1994). This statute provides for choice of law in workers compensation actions for injuries outside of Texas.

To the extent these Texas statutory choice of law rules are inadequate in certain cases, they should be supplemented with the Texas general choice of law rule, the most significant relationship test. Federal law also has specific choice of law statutes, including:

23. 12 U.S.C. § 85 (1988). This statute provides for choice of law for rates of interest charged by federally regulated banking associations. The choice of law provisions are both vertical (*Erie* or federal/state choice of law) and horizontal (state vs. state, including foreign countries).

24. 28 U.S.C. § 1346(b) (1988). This section provides for choice of law and renvoi in claims under the Federal Tort Claims Act. The Supreme Court imposed renvoi by statutory construction in *Richards v. United States*, 369 U.S. 1, 11 (1962).

25. 28 U.S.C. § 1404(a) (1988). This is the change of venue statute applicable to federal district courts. The choice of law rule of the transferor court applies to actions transferred pursuant to § 1404. In diversity cases, it is the choice of law rule from the state in which the transferor court is located. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Federal question cases seldom have choice of law questions, because federal substantive law is presumably uniform. Transfers pursuant to § 1404 do create choice of law questions where the action is transferred to a federal circuit with a different interpretation of federal law. The applicable law in such cases is that of the circuit of the transferor court. *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1127 (7th Cir. 1993). *Contra Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993).

26. 33 U.S.C. § 905 (1988). The section provides for choice of law in injury claims under the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1988).

27. FED. R. CIV. P. 17(b). This rule provides that a party's capacity is to be determined by the law of that party's domicile.

## XII. APPENDIX B: GLOSSARY

**Act of State Doctrine:** A rule of United States domestic law that State and federal courts will not review the governmental actions of a foreign sovereign performed in that sovereign's territory. This is applied most often to nationalization cases and is statutorily modified by the Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. § 2370(e) (1988).

**Better Rule of Law:** Robert Lefflar's proposal for basing choice of law on the more progressive of two or more applicable rules. See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 12, 212-19 (3d ed. 1977).

**Characterization:** The process of labeling, defining, or categorizing the facts or legal concepts in a lawsuit. Three types of characterization are claim, issue, and substance/procedure.

**Choice of Law Rules:** Always determined initially by forum law, the pertinent choice of law rules in any case may be of two types: the general common law rules (such as "lex locus delicti" in the older system, or the most significant relationship test now used in Texas), and statutory rules, which tend to be specific as to particular substantive laws.

**Constitutional Choice of Law:** The Supreme Court's term for the limits placed on choice of law by the United States Constitution.

**Dépeçage:** Splitting multiple claims in a lawsuit, or multiple issues in a claim, and applying different states' laws.

**False Conflict:** When the laws of two or more states are the same, or produce the same result (majority definition); or, when only one state has a true interest in the case (Currie's definition in his "governmental interest analysis" method for choice of law). See *infra* "Governmental Interest Analysis."

**Governmental Interest Analysis:** Professor Brainerd Currie's choice of law method, focussing on the weighing of competing state's interests in the dispute. See *infra* "State Interest."

**Klaxon Doctrine:** The federal common law rule directing the use of the choice of law rules of the state in which the federal court sits. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

**Law:**

**Local Law:** The substantive law of a state.

**Whole Law:** The substantive law plus the choice of law rules of a state.

**Foreign Law:** Any law outside the forum. Thus in Texas, all laws except those of Texas and the United States are foreign.

**Legislative Jurisdiction:** The due process limitations on the application of any state's law, requiring a reasonable connection between the dispute and the law applied. Public international law provides similar limitations.



*Most Significant Relationship Test:* Narrowly defined, the seven factor choice of law test set forth at *Restatement (Second) of Conflicts of Law* section 6. Broadly defined, section 6 and all related choice of law rules in the *Restatement (Second)*.

*Private International Law:* The term for "choice of law" used by civil-law states from the Napoleonic Code tradition.

*Public Policy:* A strongly held state interest and one factor directing choice of law. The public policies of the forum and all interested states should be considered as part of the full faith and credit choice of law analysis and in any modern choice of law theory, such as the most significant relationship test or government interest analysis.

*Renvoi:* The practice of looking to the chosen state's "whole law" (including its choice of law rule), thus letting the chosen state's (rather than the forum's) choice of law rule control. However, renvoi should not be used unless the forum's choice of law rules direct its use.

*State:* A territorial unit with a distinct general body of law. Thus "state" may refer to Texas or Ontario, as distinct state members of larger federal unions, or to the United States or Canada. "State" may not be used for Dallas, which has no general body of law, or to Europe, which also lacks (at this point) any general body of law. Some cities, such as the Vatican and Monaco, are states. Moreover, Europe may acquire state status eventually (although the European state may not be synonymous with continental Europe).

*State Interest:* A choice of law factor in the most significant relationship test (and in certain other choice of law tests), assessing the relative interests of affected states, as expressed in statutes, cases, legislative history, and other sources. Public policy is one example of state interest, but the state's interest need not rise to the level of public policy to be an "interest" for choice of law purposes. Moreover, a state interest may be expressed in the absence of a law or policy as well as in its presence, if the absence was the result of legislative or judicial intent.